Public Prosecutor v Mohd Al-Arshy bin Mus Budiono

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-45SO-18–06 OF 2018
MOHD NAZLAN J
20 DECEMBER 2018

Criminal Procedure — Sentencing — Principles of sentencing — Terrorism related offences — Aggravating Factors — Mitigating factors — Duty of the court — Whether sentence must be proportionate to gravity of offence and degree of responsibility — Penal Code s 130JB(1)(a)

The accused was originally charged under s 130J of the Penal Code and was then proffered an alternative charged under s 130JB(1)(a) of the same Code to which the accused immediately chose to plead guilty. The accused was arrested by a police team to which his handphone was seized. The accused then lead the police team to his house where a number of other items were seized as specified in the seizure form also acknowledged by the accused. An examination of the phone seized showed that it contained a total of ten video clips and five images, of which an expert report concluded that nine videos and five pictures were closely linked with the movement, ideology and propaganda of the militant IS group. The accused in his mitigation submitted the following: (a) he had chosen to plead guilty immediately upon being offered the alternative charge which has saved much judicial time, as well as costs and resources; (b) he was a 24 year old who had come here to work for he needed the income to help support his family in Jawa Timur; (c) the transgression pertained to having possession of the images of pictures and videos, which were not intended to be propagated to another party as the accused only intended to keep them for his personal viewing given his curiosity to understand better the truths about the Islamic State group and that he did not know that what he did was an offence under the law; and (d) the accused had no record of previous conviction of any criminal offence and promised to be more careful in the future when released and not to be involved in any form of criminal activity. The aggravating factors submitted by the prosecution were: (i) the court was urged to take a very serious view of the offence committed being one related to terrorism and impose a lengthy prison term against the accused; (ii) the court should take judicial notice of the militancy and terrorism related offences were very serious and deserving of much heavier punishment; (iii) the likelihood of the accused reverting to his misguided ways could not be discounted. Notwithstanding his background and antecedents, the accused would have been more matured to be able to sufficiently appreciate the consequences of his actions; and (iv) the court ought to take cognisance of the fact that terrorism-related offences were very serious and were not showing signs of abating therefore deserving of a prison

sentence with a strong element of deterrence, to prevent a repeat infringement by the accused, and no less importantly others from committing the same offence. The public interest would better be served with a prison sentence, and a long one at that, that would convey a strong message of deterrence and of the abhorrence society viewed terrorism-related offences.

Held, sentencing the accused to 18 months imprisonment:

(1) Terrorism offences were manifestly despicable. They undermine the social and public order of the nation, subvert the system of parliamentary democracy and undermine the future generations of the country. A strong deterrent sentence were usually appropriate (see para 27).

(2) Public interest should not only reflect the abhorrence of the society against the crime by the imposition of elements of retribution and deterrence in the sentence, but should also ensure the promotion of rehabilitation and reformation on the part of the accused himself (see para 31).

(3) There was no doubt that public interest demanded that terrorism offences be dealt with severely by the justice system. Public interest naturally expected that society be protected from the scourge of terrorism. The sentencing principles of prevention and deterrence were especially pertinent (see para 33).

(4) Terrorist related offences were enacted under Chapter VIA of the Penal Code. They were all provisions dealing with the abhorrent and serious crimes of terrorism. But the provisions sought to address a range of different types of terrorist related activities. The instant case concerned s 130JB(1)(a) where the maximum imprisonment was seven years. The differences in the maximum punishment enacted in the different statutory provisions reflected the dissimilarity in the degree of severity and seriousness of the various crimes. That much was clear (see paras 38 & 42).

(5) When examining the length of custodial sentence the court should consider the overall picture, and take into account especially the gravity of the type of offence committed, the facts concerning the commission of the offence as admitted by the accused, any mitigating factors, and sentences that had been imposed in the past for similar offences. In the present case, the very offence itself was entirely about being in possession of images and videos on terrorist groups. Section 130JB(1)(a) was a strict liability offence. The mere possession or custody of these items was already an offence. There was, as mentioned earlier, no evidence of the accused promoting or propagating the cause of the IS or other terrorist groups. These images and videos were kept in the accused's handphone. There was no indication of the accused professing any support from any

terrorist group, what more exhibiting any promotion of any terrorist activities. And no less significantly, the accused had not committed any violent act or provided material assistance to the IS or other terrorist group or had even planned to execute any terrorist act (see paras 44 & 46–48).

(6) The sentence to be meted must be proportionate to both the gravity of the offence and the degree of responsibility of the accused. When the aspect of the moral turpitude or blameworthiness of the accused in this case was examined, it could be fairly stated that the crime of having in one's safekeeping images related to a terrorist organisation was considerably less serious than other terrorist related offences. Further, the facts in this instant case did not indicate any plan on the part of the accused to actually take part in terrorist acts. It was not even suggested that the accused had been involved in committing any violent acts. As such, a long custodial sentence would not in this case promote the objective of rehabilitation in sentencing. A lengthy incarceration in that sense and in other words, would not be in the public interest, bearing in mind the true meaning of public interest in this context (see paras 49–52).

(7) A sentencing court bore the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and reflect the degree of public disapproval vis a vis the offence in question. Public interest must indeed take precedence over other considerations, and in that regard, the gravity of the offence as demonstrated by the facts of the case must be placed in its proper context and perspective. Mitigating factors in favour of the accused, particularly the fact that he had pleaded guilty immediately upon the alternative charge being preferred, the family's dependence on him and that he was a first time offender with no previous criminal record and claimed to be remorseful were especially pertinent too, if not strong considerations (see paras 68–69).

[Bahasa Malaysia summary

Tertuduh pada mulanya dituduh dibawah s 130J Kanun Kekesaan dan kemudiannya ditawarkan dengan pertuduhan alternatif di bawah s 130JB(1)(a) Kanun yang sama yang mana tertuduh langsung memilih untuk mengaku salah. Tertuduh telah ditahan oleh pihak polis yang mana telefon bimbitnya telah dirampas tertuduh kemudiannya telah membawa pasukan polis kerumahnya yang mana sejumlah barang lain telah dirampas sepertimana yang dibutirkan dalam borang penggeledahan yang diakui oleh tertuduh. Pemeriksaan telefon yang dirampas menunjukan bahawa ianya mengandungi sepuluh klip video dan lima gambar, yang mana berdasarkan laporan pakar telah mendapati bahawa sembilan klip video dan lima gambar adalah berkait rapat dengan pergerakan, ideologi dan propaganda kumpulan militan IS.

Tertuduh dalam rayuan mitigasinya menghujahkan perkara berikut: (a) dia telah memilih untuk mengaku salah sejurus selepas ditawarkan dengan pertuduhan alternatif dan telah menjimat masa kehakiman dan juga kos dan sumber; (b) dia berusia 24 tahun yang datang ke Malaysia untuk berkerja kerana dia memerlukan pendapatan untuk menanggung keluarganya di Jawa Timur; (c) kesalahan berkaitan dengan pemilikan imej video dan gambar, yang tidak bertujuan untuk dipanjangkan kepada pihak lain kerana tertuduh berniat untuk menyimpannya untuk kegunaan peribadi kerana sifat ingin tahu tertuduh untuk memahami kebenaran mengenai kumpulan Islamic State dan dia tidak tahu bahawa apa yang dilakukannya merupakan satu kesalahan disisi undang-undang; dan (d) bahawa tertuduh tiada rekod sabitan atau kesalahan lampau dan berjanji untuk lebih berhati-hati di masa hadapan apabila dilepaskan dan tidak akan terlibat dengan apa-apa aktiviti jenayah. Hujahan pemberatan pihak pendakwaan adalah: (i) mahkamah digesa untuk mengambil pandangan serius terhadap kesalahan yang dilakukan kerana satu yang berkaitan dengan keganasan dan mengenakan tempoh pemenjaraan yang panjang terhadap tertuduh; (ii) mahkamah perlu mengambil pengiktirafan kehakiman terhadap kesalahan berkaitan militan dan pengganas adalah serius dan oleh yang demikian patut menerima hukuman yang berat; (iii) kebarangkalian tertuduh akan kembali ke jalan yang salah tidak boleh diketepikan. Tanpa mengambil kira latar belakang tertuduh, tertuduh sepatutunya lebih matang dan mampu untuk menghayati akibat tindakkannya; dan (iv) mahkamah perlu mengambil tahu fakta yang kesalahan berkaitan keganasan adalah serius dan tidak menunjukan tanda akan berkurangan oleh itu patut menerima hukuman pemenjaraan dengan elemen pencegahan untuk mengelakkan tertuduh mengulangi kesalahan, dan juga orang lain dari melakukan kesalahan yang sama. Kepentingan awam akan lebih terpelihara dengan hukuman pemenjaraan yang lama, akan menunjukan mesej pencegahan yang jelas dan kebencian masyarakat terhadap kesalahan berkaitan keganasan.

Diputuskan, menghukum tertuduh dengan 18 bulan penjara:

(1) Hukuman tertuduh adalah yang keji. Ianya menjejaskan ketenteraman sosial dan awam negara, sistem demokrasi berparlimen dan menjejaskan generasi akan datang negara. Hukuman pencegahan yang tegas adalah secara amnya bersesuaian (lihat perenggan 27).

(2) Kepentingan awam bukan saja menunjukan kebencian masyarakat terhadap kesalahan yang dilakukan, tetapi juga perlu untuk memastikan rehabilitasi dan reformasi tertuduh (lihat perenggan 31).

(3) Tiada keraguan bahawa kepentingan awam memerlukan kesalahan pengganas dikekang secara tegas oleh sistem perundangan. Kepentingan awam secara umumnya memerlukan masyarakat dilindungi dari

pengganas. Prinsip hukuman berkenaan dengan pencegahan adalah penting (lihat perenggan 33).

(4) Kesalahan bekaitan pengganas yang dibuat di bawah Bab VIA Kanun Keseksaan. Kesemuanya adalah peruntukan berkenaan dengan kesalahan pengganas yang serius dan hina. Akan tetapi, peruntukan-peruntukan ini bertujuan untuk menangani beberapa jenis aktiviti berkaitan dengan keganasan. Kes ini berkaitan dengan s 130JB(1)(a) yang mana hukuman maksima adalah tujuh tahun. Perbezaan hukuman maksima yang ditetapkan dalam peruntukan statutori menunjukan ketidaksamaan dalam keseriusan kesalahan yang berbeza. Perkara ini adalah jelas (lihat perenggan 38 & 42).

(5) Apabila meneliti tempoh hukuman pemenjaraan, mahkamah perlu mengambil kira secara keseluruhan, dan keberatan kesalahan yang dilakukan, fakta mengenai kesalahan yang dilakukan sepertimana diakui oleh tertuduh, apa-apa faktor mitigasi, dan hukuman yang telah diberikan berkenaan dengan kesalahan yang sedemikian rupa. Dalam kes ini, kesalahan tersebut adalah berkenaan dengan pemilikan gambar dan video kumpulan pengganas. Seksyen 130JB(1)(a) adalah kesalahan liabiliti ketat. Pemilikkan atau kawalan terhadap barang ini adalah satu kesalahan. Sepertimana yang dinyatakan terdahulu, tiada keterangan tertuduh mempromosi atau menyebar perjuangan IS atau apa-apa kumpulan pengganas lain. Gambar dan video ini disimpan dalam telefon bimbit tertuduh. Dan tidak kurang juga, tertuduh tidak melakukan apa-apa tindakan ganas atau memberi bantuan kepada IS atau apa-apa kumpulan pengganas lain atau merancang untuk melakukan apa-apa tindakan pengganas (lihat perenggan 44 & 46–48).

(6) Hukuman yang diberikan hendaklah sepadan dengan keberatan kesalahan dan kebertanggungjawaban tertuduh. Dengan aspek kekejian moral atau kebersalahan tertuduh dalam kes ini diteliti, adalah wajar untuk menyatakan bahawa kesalahan memiliki gambar berkaitan dengan kumpulan pengganas adalah kurang serius dengan kesalahan berkaitan pengganas lain. Lanjutan itu, fakta didalam kes ini tidak menunjukan apa-apa perancangan dipihak tertuduh untuk melibatkan diri dengan perlakuan penjenayah. Oleh itu, tempoh pemenjaraan yang lama dalam kes ini tidak akan memajukan objektif pemulihan dalam hukuman. Tempoh pemenjaraan yang lama tidak selaras dengan kepentingan awam mengambil kira makna sebenar kepentingan awam dalam konteks ini (lihat perenggan 49–52).

(7) Mahkamah yang menjatuhkan hukuman mempunyai tanggungjawab untuk memastikan hukuman berpadanan dengan keseriusan perlakuan jenayah untuk menunjukan kebencian awam terhadap kesalahan tersebut. Kepentingan awam hendaklah mengambil kira pertimbangan lain, dan dalam perkara terebut, keberatan kesalahan sepertimana

ditunjukkan dengan fakta kes perlu diletakkan dalam konteks dan prespektif yang sebenar. Faktor mitigasi yang berpihak kepada tertuduh, terutamanya fakta yang dia telah mengaku salah sejurus selepas pertuduhan alternatif ditawarkan, kebergantungan keluarganya terhadapnya dan dia merupakan pesalahan kali pertama tanpa rekod jenayah lampau dan mengatakan bahawa telah insaf juga penting, sekiranya ianya bukan pertimbangan yang kuat (lihat perenggan 68–69).]

Notes

For cases on principles of sentencing, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5119–5264.

Cases referred to

Lim Yoon Fah v PP [1971] 1 MLJ 37 (refd)
Melvani v PP [1971] 1 MLJ 137 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
Pendakwa Raya lwn Anuar bin Ab Rawi [2016] MLJU 533, HC (refd)
Pendakwa Raya lwn Muamar Gadaffi bin Mohamad Shafawi [2017] MLJU 483, CA (distd)
Pendakwa Raya lwn Muhammad Hakimin bin Azman [2017] MLJU 1024, HC (refd)
Pendakwa Raya lwn Ummi Kalsom bt Bahak [2016] 6 MLJ 407, HC (refd)
Pendakwa Raya v Abdul Halim bin Ishak & Anor [2013] MLJU 821; [2013] 9 CLJ 559, CA (refd)
Pendakwa Raya v Muhammad Sani Mahdi bin Sahar [2016] MLJU 1106, CA (refd)
PP v Aszroy bin Achoi [2018] 9 MLJ 702; [2018] 8 CLJ 762, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Muhammad Kasyfullah bin Kassim [2016] 6 MLJ 567; [2017] 1 CLJ 63, CA (distd)
PP v Shahrul Azuwan bin Adanan & Anor [2013] 8 MLJ 70, HC (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
PP v Wan Mohamad Nur Firdaus bin Abd Wahab and other appeal [2018] MLJU 1291, CA (refd)
PP v Yazid bin Sufaat & Ors [2015] 1 MLJ 571; [2014] 2 CLJ 670, CA (refd)
R v Ball (1951) 35 Cr App Rep 164 (refd)
R v Ipeelee [2012] SCC 13, SC (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134, FC (refd)
Siti Noor Aishah bt Atam lwn Pendakwa Raya [2018] 6 MLJ 614; [2018] 5 CLJ 44, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 66B, 66D

Criminal Procedure Code ss 112, 130(1)(a), 130F, 130J, 130J(1), (1)(a), 130JB(1)(a), 130N(b), 511, Chapter VIA

Munirah bt Shamsudin (Deputy Public Prosecutor, Attorney General's Chambers) for the applicant.

Zaini bt Bakar (Najmuddin & Partners) for the respondent.

Mohd Nazlan J:

INTRODUCTION

[1] This judgment concerns the sentence meted by this court on the accused who pleaded guilty to a charge of the commission of an offence under s 130JB(1)(a) of the Penal Code.

KEY BACKGROUND FACTS

[2] The accused was originally charged for an offence under s 130J of the Penal Code which concerned providing assistance for terrorist acts. When the case was subsequently called for mention, he chose to plead guilty to an alternative charge offered by the prosecution under s 130JB(1)(a) which prohibits possession of items associated with terrorist groups.

[3] The alternative charge reads as follows:

> Bahawa kamu pada 17 Januari 2018 jam lebih kurang 3.00 ptg di Restoran Klasik Hijau, Jalan Awan Hijau, Taman Overseas Union dalam daerah Brickfields dalam Wilayah Persekutuan Kuala Lumpur telah ada dalam milikan kamu 5 imej gambar dan 10 video di dalam telefon bimbit jenis IPhone model A1429 (IMEI: 013441007574780) yang merupakan item yang berkaitan dengan Kumpulan Pengganas Islamic State (IS), dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 130JB(1)(a) Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.
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> Hukuman: Jika sabit kesalahan kamu hendaklah diseksa dengan penjara untuk tempoh tidak melebihi tujuh tahun atau denda dan boleh dilucuthak mana-mana item tersebut.

[4] Section 130JB(1)(a) reads:

> 130JB Possession, etc of items associated with terrorist groups or terrorist acts
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> (1) Whoever —
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> (a) has possession, custody or control of; or

(b) provides, displays, distributes or sells,

any item associated with any terrorist group or the commission of a terrorist act shall be punished with imprisonment for a term not exceeding seven years, or with fine, and shall also be liable to forfeiture of any such item.

(2) In this section —

'item' includes publications, visual recordings, flags, banners, emblems, insignia and any other thing displaying symbols associated with a terrorist group, terrorist act or ideology of a terrorist group;

'publications' includes all written, pictorial or printed matter, and everything of a nature similar to written or printed matter, whether or not containing any visible representation, or by its form, shape or in any other manner capable of suggesting words or ideas, or an audio recording and every copy, translation and reproduction or substantial translation or reproduction in part or in whole thereof.

[5] The accused was then duly convicted for having committed the offence under s 130JB(1)(a) as charged, after this court was satisfied that the accused understood the nature and consequences of his plea and voluntarily admitted to the charge without qualification, including to the facts of the case as presented and to the exhibits tendered in the court.

THE KEY FACTS OF THE CASE

[6] The facts of the case, as submitted by the prosecution, are pretty straightforward.

[7] The accused was arrested by a police team from the counter terrorism division (E8), Special Branch PDRM Bukit Aman on 17 January 2018 around 3pm at a restaurant in Taman Overseas Union Kuala Lumpur. The team seized the accused's handphone (white iPhone model A1429 No IMEI 013551007574780) and a few other items as listed in the seizure form signed by the accused.

[8] On the same day, the police team were led by the accused to the accused's house at Kg Pasir Petaling, Klang Lama, Kuala Lumpur, where a number of other items were seized as specified in the seizure form also acknowledged by the accused. All items were handed over to the investigating officer ('IO') on the same day at about 5pm.

[9] On 23 January 2018 at around 2.30pm, the IO recorded the statement of the accused under s 112 of the Criminal Procedure Code. Crucially, the accused admitted that the white iPhone seized by the police was his.

[10] The handphone was sent by the IO to a forensic officer of PDRM for analysis on 25 January 2018. The same was then collected by the IO from the forensic officer on 26 March 2018, together with the analysis results and examination report bearing reference 18F0484. Essentially early investigations on the forensic report by the IO found a number of videos and images stored in the handphone of the accused which contents were believed to have connection with the militant terrorist group Islamic State ('IS').

[11] On 12 April 2018, ten video clips and five images featuring elements suspected to be the IS group recovered from the handphone of the accused were submitted by the IO to a senior lecturer at the Pusat Akidah dan Keamanan Global, Fakulti Pengajian Islam at Universiti Kebangsaan Malaysia ('UKM').

[12] On 3 May 2018, the IO met with the senior lecturer and collected the results of the analysis undertaken by the latter which was documented in a report entitled 'Laporan Saksi Pakar Mengenai Video dan Gambar Milik Mohd Al-Arshy bin Mus Budiono yang bertanda Tulisan 18F0484'.

[13] The report concluded that nine videos and five pictures and their contents were closely linked with the movement, ideology and the propaganda of the militant Islamic State group.

[14] The IS group had been gazetted as a terrorist group under ss 66B and 66D of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 pursuant to a Federal Government *Gazette* PU(A) 301 dated 12 November 2014.

[15] Given the available evidence, the accused had thus committed an offence under s 130JB(1)(a) of the Penal Code punishable under the same provision for possessing videos and images in his handphone featuring elements of the terrorist group IS.

MITIGATION BY THE ACCUSED

[16] In mitigation, it was submitted by the counsel for the accused that the accused had chosen to plead guilty immediately upon being offered the alternative charge under s 130JB(1)(a), and this has saved much judicial time, as well as costs and resources of various parties, including, especially, those intended to be called as witnesses. This, according to his counsel, also demonstrated that the accused was remorseful of the wrong he had committed.

[17] The accused, aged 24 is an Indonesian national. He came to this country when he was 18, and has been working here ever since, now with a construction company. The accused needed income to help supporting his

family in Jawa Timur, where his grandmother, aged 65, is now raising his four school-going siblings. His parents had divorced and abandoned them.

[18] The counsel for the accused drew the attention of this court to the facts of the case, particularly the offence in question and the actual nature of the crime as specified in the charge and admitted by the accused. Specifically, the transgression pertains to the offence of having in the possession of the accused five images of pictures and nine videos associated with terrorist groups, all of which are saved and stored in the handphone of the accused.

[19] The five picture images as found had been edited by the accused himself and, according to him, were not intended to be propagated to any other party. There is no evidence to such effect either, and the same could be said concerning the videos, as the accused only intended to keep them for his personal viewing given his curiosity to understand better the truths about the Islamic State group. And the accused in the first place did not know that what he did was an offence under the law.

[20] The accused has no record of previous conviction of any criminal offence. He is a first offender. The accused sought the forgiveness for the crime that he had committed which he did not know was wrong in the first place, and promised to be more careful in the future when released, and not to be involved in any form of any criminal activity.

SUBMISSION OF AGGRAVATING FACTORS

[21] The prosecution disagreed with the mitigation arguments. The prosecution on the other hand urged this court to take a very serious view of the offence committed — one relating to terrorism — and impose a lengthy prison term against the accused. It was argued that the court should take judicial notice that militancy and terrorism related offences are very serious and deserving of much heavier punishment, more so as such crimes continued to be rampant in and harmful to the society and in the wider global context.

[22] The learned DPP submitted that even though the accused was a first offender, the likelihood of the accused reverting to his misguided ways cannot be discounted. Notwithstanding his background and antecedents, the accused would have been more than matured to be able to sufficiently appreciate the consequences of his actions.

[23] The prosecution urged this court to take cognisant of the fact that terrorism-related offences are very serious and are not showing signs of abating. They continue to be on the rise, deserving of a prison sentence with a strong element of deterrence, to prevent a repeat infringement by the accused, and no

less importantly, others from committing the same offence. The prosecution emphasised that public interest would be better served with a prison sentence, and a long one at that, that could convey a strong message of deterrence and of the abhorrence society viewed terrorism-related offences.

[24] The crux of the submission of the prosecution was that public interest would demand that the accused should be made to truly learn his lesson from the sentence imposed which should also send the right signal to the public to act as the appropriate deterrence.

EVALUATION AND DECISION OF THIS COURT

Seriousness of terrorism

[25] Nothing can detract from the fact that the offence for which the accused had pleaded guilty is one related to terrorism. As stated, the Government *Gazette* PU(A) 301 declared the group known as Islamic State to be a terrorist group under ss 66B and 66D of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[26] In this context, a leading pronouncement on the seriousness of the threat of terrorist activities was made by the Court of Appeal in the often-quoted case of *Public Prosecutor v Yazid bin Sufaat & Ors* [2015] 1 MLJ 571; [2014] 2 CLJ 670, in the following terms:

> [23] An act of terrorism is a transnational phenomenon. It has no territorial limits. It transcends national borders. For instance, an act of terrorism may be planned or hatched within Malaysia with an intention to execute it outside Malaysia. The intention of SOSMA is, among others, to prevent Malaysia from being used as a terrorist haven. S Rajendra Babu and GP Marthur JJ in *People's Union for Civil Liberties & Anor v Union of India* AIR [2004] SC 456 aptly describe acts of terrorism as follows:
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> > The terrorist threat that we are facing is now on an unprecedented global scale. Terrorism has become a global threat with global effects. It has become a challenge to the whole community of civilized nations. Terrorist activities in one country take on a transnational character, carrying out attacks across one border, receiving funding from private parties or a government across another, and procuring arms from multiple sources. Terrorism in a single country can readily become a threat to regional peace and security owing to its spill over effects. It is therefore difficult in the present context to draw a sharp distinction between domestic and international terrorism. Many happenings in the recent past caused the international community to focus on the issue of terrorism with renewed intensity.

[27] Terrorism offences are manifestly despicable. They undermine the social and public order of the nation, subvert the system of parliamentary democracy and undermine the future generations of the country. A strong deterrence sentence is usually appropriate. In *Pendakwa Raya v Abdul Halim bin Ishak & Anor* [2013] MLJU 821; [2013] 9 CLJ 559 where the Court of Appeal reiterated thus:

> ... denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not to be tolerated by society either in general or in a specific instance. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part, its aims are similar to that of deterrence, it has also been seen to be associated with retribution.

Public interest

[28] The overarching consideration in sentencing however is public interest. It is most useful to start any analysis of sentencing by reiterating the importance of public interest, in respect of which it was stated by Hashim Yeop Abdullah Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 as follows:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* as follows:
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> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest.

[29] This often-cited judgment of Hilbery J for the Court of Appeal in *R v Ball* (1951) 35 Cr App Rep 164 is noteworthy for elucidating two other sentencing considerations of general importance. The first, also referred to in *Public Prosecutor v Loo Choon Fatt* is the basis for appellate intervention, as follows:

> In the first place, this court does not alter a sentence which is the subject of an appeal merely because the members of the court might have passed a different sentence. The trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles, then this court will intervene.

[30] The other aspect, followed by Chang Min Tat J (as he then was) in the case of *Lim Yoon Fah v Public Prosecutor* [1971] 1 MLJ 37, is in respect of the true meaning of the concept of public interest, which is not always easily understood, but explained in the following terms:

The learned president stressed the public interest in coming to his decision on sentence and was of the opinion that armed robberies should be discouraged by a deterrent sentence. With respect, I would agree. But in this case, it seems to me that in safeguarding the public interest, the learned president had, with all respect, not sufficiently considered the full meaning of that passage from Hilbery J in *R v Ball* (1951) 35 Cr App Rep 164 which he quoted and is now reproduced:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. *The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living*. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

and, in particular the sentence therein which I have emphasised, and applied it to the appellant. A particular criminal may be so induced only by a deterrent sentence of a long term of imprisonment. Another may well profit by being given a second chance. As the Court of Appeal had said in *Ho Kin Luan & Anor v Public Prosecutor* [1959] 1 MLJ 159 at p 162:

> Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender.

[31] As such, public interest should not only reflect the abhorrence of the society against the crime by the imposition of elements of retribution and deterrence in the sentence, but should also ensure the promotion of rehabilitation and reformation on the part of the accused himself.

[32] Another case of importance in this context which underscores the need to take a holistic approach is the Supreme Court decision in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 which ruled in the following clear terms:

> In assessing the length of custodial sentence the court must look at the overall picture in perspective by considering firstly the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

[33] There is no doubt that public interest demands that terrorism offences be dealt with severely by the justice system. Public interest naturally expects that society be protected from the scourge of terrorism. The sentencing principles of prevention and deterrence are especially pertinent.

Relevance of guilty plea

[34] Significantly however, a guilty plea is a factor that should always be taken into account in assessing the appropriate sentence. This is well-settled. In the majority decision of the Federal Court in *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 Lee Hun Hoe CJ (Borneo) held as follows:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only serves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses ...

[35] A similar sentiment was expressed by Wee Chong Jin CJ in the Singapore case of *Melvani v Public Prosecutor* [1971] 1 MLJ 137 who had earlier stated thus:

> In principle I consider it proper that where an accused person pleads guilty the court in assessing sentence ought to consider such plea as a mitigating factor. What weight ought to be given by the court depends on the other facts made known to the court at the time the sentence is considered ...

[36] What the guilty plea means in practical terms vis a vis the reduction or discount normally granted to the jail sentence was explained in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, where it was held by the Supreme Court as follows:

> in this case, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard being had to the amount of money defalcated and the other circumstances of the case. *It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.* In this particular case, apart from the plea of guilt, the sentence must also be discounted to reflect the full restitution and other mitigating factors. The sentence imposed on the appellant was therefore manifestly excessive and should be reduced to four years' imprisonment. (Emphasis added.)

[37] The fact that a guilty plea is a mitigating factor which saves much judicial time as expressed in *Sau Soo Kim v Public Prosecutor* and *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* was accepted by the Court of Appeal in *Pendakwa Raya v Muhammad Sani Mahdi bin Sahar* [2016] MLJU 1106 where the accused pleaded guilty, like in the instant case before me, to an alternative charge under s 130JB(1)(a) of the Penal Code and punishable under

the same provision of the Act (see later).

[38] Terrorist related offences are enacted under Chapter VIA of the Penal Code. They are all provisions dealing with the abhorrent and serious crimes of terrorism. But the provisions seek to address a range of different types of terrorist related activities. The instant case concerns s 130JB(1)(a) where the maximum imprisonment is seven years.

[39] In the case of *Pendakwa Raya lwn Ummi Kalsom bt Bahak* [2016] 6 MLJ 407 the High Court sentenced the accused who pleaded guilty to an offence under s 130(1)(a) read together with s 511 of the Penal Code to two years imprisonment despite s 130J providing for a maximum jail sentence of 30 years. This is contrasted with the maximum jail term of seven years prescribed under s 130JB(1)(a) under which the accused herein had pleaded guilty.

[40] In *Public Prosecutor v Muhammad Kasyfullah bin Kassim* [2016] 6 MLJ 567; [2017] 1 CLJ 63 the Court of Appeal also increased the sentence of the accused who pleaded guilty to an offence also under s 130J(1)(a) of the Penal Code — on providing support to the commission of a terrorist act involving the use of firearm — from five to 12 years.

[41] In *Pendakwa Raya lwn Muamar Gadaffi bin Mohamad Shafawi* [2017] MLJU 483 even though the accused pleaded guilty to an offence under s 130F of the Penal Code (which provides for a maximum jail terms of 30 years), the Court of Appeal enhanced the jail term to 15 years. In that case, the accused opened two Facebook accounts to propagate militant Islamic State ideology to friends on the social media, and provided military type training to them.

[42] The differences in the maximum punishment enacted in the different statutory provisions reflect the dissimilarity in the degree of severity and seriousness of the various crimes. That much is clear.

[43] But it is also the case that in respect of a specific section, say s 130JB(1)(a) herein, the maximum of seven years' jail also reflects the range of possible length of incarceration which is dependent on the exercise of a judicial discretion on the appropriate sentence. This is where the observation made by the Supreme Court in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor*, a case referred to earlier, becomes especially pertinent.

All factors to be taken into account

[44] Thus, when examining the length of custodial sentence the court should consider the overall picture, and take into account especially the gravity of the type of offence committed, the facts concerning the commission of the

offence as admitted by the accused, any mitigating factors, and sentences that have been imposed in the past for similar offences.

[45] This s 130JB(1)(a) does not specify a minimum jail sentence, unlike say, s 130N(b) which states a minimum jail term of seven years whilst enacting a maximum of life imprisonment or for a term of 30 years. Further, given the words 'shall be liable to' (as opposed to 'shall be punished with') a conviction could also technically only result in an accused being fined.

[46] Further, the very offence itself is entirely about being in possession of images and videos on terrorist groups. Section 130JB(1)(a) is a strict liability offence (see the Court of Appeal decision in *Siti Noor Aishah bt Atam lwn Pendakwa Raya* [2018] 6 MLJ 614; [2018] 5 CLJ 44). The mere possession or custody of these items is already an offence. There is, as mentioned earlier, no evidence of the accused promoting or propagating the cause of the IS or other terrorist groups.

[47] These images and videos are kept in the accused's handphone. There was no indication of the accused professing any support from any terrorist group, what more exhibiting any promotion of any terrorist activities.

[48] And no less significantly, the accused had not committed any violent act or provided material assistance to the IS or other terrorist group or had even planned to execute any terrorist act.

Severity of offence — Proportionate punishment

[49] But it cannot be denied that the sentence to be meted must be proportionate to both the gravity of the offence and the degree of responsibility of the accused. In the often quoted decision of the Canadian Supreme Court in *R v Ipeelee* [2012] SCC 13 it was held by Le Bel J instructively as follows:

> Proportionality is the *sine quo non* of a just sentence. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serve a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[50] When the aspect of the moral turpitude or blameworthiness of the accused in this case is examined, it could be fairly stated that the crime of

having in one's safekeeping images related to a terrorist organisation is considerably less serious than other terrorist related offences.

[51] It bears repetition that the evidence in this case shows just possession of IS-related images. There was no evidence to show the images or videos were shared with other parties, let alone to demonstrate support for the causes or beliefs of any terrorist groups. Neither is there evidence of the accused propagating any militant causes of any terrorist organisations like in *Muamar Gadaffi bin Mohamad Shafawi*. This is also quite unlike the facts in *Public Prosecutor v Muhammad Kasyfullah bin Kassim* where the offender pleaded guilty to providing support to the commission of a terrorist act involving the use of firearms.

[52] Further, the facts in this instant case do not indicate any plan on the part of the accused to actually take part in terrorist acts. It was not even suggested that the accused has been involved in committing any violent acts. As such, a long custodial sentence would not in this case promote the objective of rehabilitation in sentencing. A lengthy incarceration in that sense and in other words, would not be in the public interest, bearing in mind the true meaning of public interest in this context.

[53] I accept that in the case of *Pendakwa Raya lwn Ummi Kalsom bt Bahak* where the accused was sentenced to two years in jail despite the applicable s 130J providing for a maximum jail sentence of 30 years or life imprisonment, the alternative charge was read together with s 511 which concerns offences in the nature of attempts to commit crimes. This meant that the maximum jail sentences is halved by statute, and the maximum became 15 years.

[54] In other words the offence in that case was incomplete, or inchoate. Yet when one examines the objectionable conduct in that case, it cannot be said that what she attempted to do was not grave. The offender in that case had planned to go to Syria to get married to a Malaysian terrorist and generally to provide support and assistance to the Islamic State group. She was caught at KLIA2 before she could board a flight to Brunei from where she would have continued her journey to Istanbul before reaching Syria. In other words, but for the arrest that foiled everything for her, the offender in that case had every intention and had taken positive steps to travel and pretty much to be part of the IS group at the heart of the civil conflict and the associated violence and atrocities in war-torn Syria.

[55] I do not think it can be truly disputed that the facts and particularly the conduct of the offender in *Pendakwa Raya lwn Ummi Kalsom bt Bahak* is more serious than in the case of the accused before this court. The sentence meted against the offender in that case was two years, after the court considered other

antecedents and the background of the offender, in addition to the guilty plea.

[56] Similarly in this case, the background of the accused cannot not be taken into account. Although it can be said to be a natural consequence of those who are found guilty of transgressions of the law of the land, his incarceration has affected the livelihood of his family. Thus in *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70, Abdul Rahman Sebli J (as he then was) said:

> [14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. *But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.* (Emphasis added.)

[57] Again, this statement underscores the seriousness of the offence. But as stated in the instant case, there was no real victims, there was no sufferings, or any damage as such.

Sentencing trend

[58] Although it has been said that judicial precedent plays little role in sentencing in the absence of the background and antecedents of the accused as well as the facts of the case, the recent and present trend of sentencing of the offence in question is always pertinent. This was reiterated by the Supreme Court in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor*, as mentioned earlier. An essential consideration in the determination for an appropriate sentence is therefore to examine the sentencing trend for the same offence in like circumstances.

[59] I now briefly refer to three fairly recent decisions of the Court of Appeal which concerned sentencing of an accused under the same s 130JB(1)(a). The first is *Pendakwa Raya v Muhammad Sani Mahdi bin Sahar* [2016] MLJU 1106 where like in the case before me, the accused in that case pleaded guilty of a charge of possessing video recordings associated with terrorist acts. The Court of Appeal affirmed the decision of the High Court which had sentenced the accused to 18 months in jail.

[60] In *Public Prosecutor v Wan Mohamad Nur Firdaus bin Abd Wahab and other appeal* [2018] MLJU 1291, the accused pleaded guilty to two charges, one under s 130J(1) and the other under s 130JB(1)(a). The High Court

imposed a jail term of eight years for the first and five years for the second charge. The Court of Appeal reduced the same to five years and two years respectively.

[61] The third case is *Siti Noor Aishah bt Atam lwn Pendakwa Raya* [2018] 6 MLJ 614; [2018] 5 CLJ 44 where the accused did not plead guilty but claimed trial for the charge of being in possession of 12 books associated with three specified terrorist groups pursuant to s 130JB(1)(a). At the conclusion of the trial, the High Court sentenced the accused to five years imprisonment from arrest date. The Court of Appeal substitutes that with a term of three years in jail.

[62] It is particularly noteworthy that in *Muhammad Sani Mahdi* (18 months' imprisonment) there were 39 videos in his handphone. And evidence showed he shared the recording with his friends. And in *Wan Mohamed Nur Firdaus* (two years' imprisonment) there were 23 images in the accused's mobile device.

[63] And the accused in that case was also convicted for another more serious charge under s 130J(1)(a). In contradistinction, the accused in the case before me did not share the offending items with anyone, and was only charged for this single charge under s 130JB(1)(a) involving ten videos and five images.

[64] Further, unlike the case of *Siti Noor Aishah* (three years imprisonment) where the conviction was recorded after a full trial, in the instant case, the accused had pleaded guilty at the earliest opportunity well before the intended scheduled trial.

[65] Additionally, I wish to also refer to two recent High Court decisions. The first is *Pendakwa Raya lwn Anuar bin Ab Rawi* [2016] MLJU 533 where the accused pleaded guilty to a single charge under s 130JB(1)(a) and sentenced to two years' imprisonment from the date of arrest. The Court of Appeal in that case noted that the accused was a religious leader in his community with the ability to influence others. This aspect is not present in the instant case.

[66] The other is a very recent case of *Public Prosecutor v Aszroy bin Achoi* [2018] 9 MLJ 702; [2018] 8 CLJ 762 where the accused faced two charges, one under s 130J(1) and the other, s 130JB(1)(a). The accused did not plead guilty. At the end of trial, the court found him guilty of both, and sentenced him to seven years for the charge under s 130J(1); and in respect of the charge of possession of images related to terrorism like in the instant case, to two years' imprisonment, respectively.

[67] Still, much would and should depend on the facts of the case. In another

A High Court decision of *Pendakwa Raya lwn Muhammad Hakimin bin Azman* [2017] MLJU 1024, the plea of guilty to a charge of possession of seven Islamic State — related images in the accused's laptop attracted a jail term of only one year under s 130JB(1)(a) since it was ruled among others that the offending images did not depict any militant or violent tendencies.

B

Decision

[68] In the final analysis, a sentencing court bears the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and C reflect the degree of public disapproval vis a vis the offence in question. Public interest must indeed take precedence over other considerations, and in that regard, the gravity of the offence as demonstrated by the facts of the case must be placed in its proper context and perspective.

D **[69]** Mitigating factors in favour of the accused, particularly the fact that he had pleaded guilty immediately upon the alternative charge being preferred, the family's dependence on him and that he is a first time offender with no previous criminal record and claimed to be remorseful are especially pertinent too, if not strong considerations.

E

[70] Having evaluated those considerations, including having referred to the aforesaid similar cases and in seeking to achieve a sentence that as closely as possible reflects the key objectives of especially prevention and deterrence, but also retribution and reformation (see *Public Prosecutor v Teh Ah Cheng* [1976] F 2 MLJ 186), in my judgment, the facts of this case warrant a custodial sentence of 18 months from the date of arrest.

CONCLUSION

G **[71]** In view of the foregoing, in particular having taken into account the facts of the case, the mitigating and aggravating factors and the principles of sentencing and its prevailing trend, I sentenced the accused who is convicted upon his guilty plea to a charge for an offence under s 130JB(1)(a) of the Penal Code, to a term of imprisonment of 18 months from the day of his arrest.

H

Accused sentenced to 18 months imprisonment.

Reported by Izzat Fauzan

I